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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD THUILLARD and MARY S. THUILLARD, Plaintiffs-Appellants, v. UNITED STATES OF AMERICA, "UNITED STATES CUSTOMS AND BORDER SECURITY", Defendant-Appellee.	No. 06-35580 D.C. No. CV-04-00368-FVS MEMORANDUM*

Appeal from the United States District Court
For the Eastern District of Washington
Fred L. Van Sickle, Chief District Judge, Presiding

Argued and Submitted November 5, 2007
Seattle, Washington

Before: CANBY, GRABER, and GOULD, Circuit Judges.

Plaintiffs Mary Susan Thuillard ("Mrs. Thuillard"), a former inspector for defendant United States Customs and Border Protection ("Customs"), and her

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

husband, Donald Thuillard ("Mr. Thuillard"), appeal the district court's dismissal of their *pro se* complaint against Customs, which was brought under the Federal Tort Claims Act ("FTCA"). We have appellate jurisdiction pursuant to 28 U.S.C. § 1291.

I. Threshold Issues: Sovereign Immunity and Civil Service Reform Act ("CSRA") Preemption

"We review the district court's decision regarding the absence of subject matter jurisdiction de novo." *Botsford v. Blue Cross & Blue Shield of Montana, Inc.*, 314 F.3d 390, 392 (9th Cir. 2002), *amended by* 319 F.3d 1078 (9th Cir. 2003). "Sovereign immunity is jurisdictional in nature." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). We also lack jurisdiction over state tort claims preempted by the Civil Service Reform Act of 1978, Pub.L. No. 95-454, 92 Stat. 1111. *See Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991).

The Thuillards' claims arising out of Customs' alleged failure to remove false information from the NCIC II database sound in defamation. Accordingly, they are barred by 28 U.S.C. § 2680(h), which retains sovereign immunity over "[a]ny claim arising out of . . . libel [or] slander."

The Thuillards' claims arising out of Customs' alleged misconduct in the course of the internal investigation are predicated on actions taken by Customs

which were "closely intertwined with [the plaintiff's] conditions of employment." *Lehman v. Morrissey*, 779 F.2d 526, 527 (9th Cir. 1985) (per curiam). Therefore, these actions fall within the CSRA's definition of "personnel actions," for which the "CSRA is the exclusive remedy," *Brock v. United States*, 64 F.3d 1421, 1425 (9th Cir. 1995), regardless whether the personnel action is taken by a co-worker or a supervisor. *See Mahtesian v. Lee*, 406 F.3d 1131, 1134-35 (9th Cir. 2005) (applying the CSRA to a co-worker who "had authority to recommend or not recommend [the plaintiff] for employment"); *Collins v. Bender*, 195 F.3d 1076 (9th Cir. 1999) (deciding the "personnel action" question without considering that plaintiffs and defendants were co-workers, not subordinates and supervisors). These claims accordingly were properly dismissed by the district court.

The district court, however, erroneously relied on sovereign immunity and CSRA preemption to dismiss the malicious harassment and civil harassment claims arising out of the criminal investigation of Mrs. Thuillard. These claims are neither barred by § 2680(h), which retains sovereign immunity only for a limited number of specifically enumerated torts, nor preempted by the CSRA, which applies only to "personnel actions." 5 U.S.C. § 2302.

II. Substantive Review

We review de novo a district court's decision to dismiss a complaint for

failure to state a claim. *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005). "In determining whether dismissal was properly granted, we assume all factual allegations are true and construe them in the light most favorable to the plaintiff." *Cervantes v. United States*, 330 F.3d 1186, 1187 (9th Cir. 2003). Similarly, "[w]e review a grant of summary judgment de novo. Summary judgment is appropriate only when, viewing the evidence in the light most favorable to the nonmoving party, the court concludes that there are no genuine issues of material fact with respect to the claims." *Taybron v. City & County of San Francisco*, 341 F.3d 957, 960 (9th Cir. 2003) (citations omitted).

A. Harassment

In order to prevail in a civil action for malicious harassment, the Thuillards must show that Customs

> maliciously and intentionally commit[ted] one of the following acts because of [its] perception of the victim's race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicap: (a) Cause[d] physical injury to the victim or another person; (b) Cause[d] physical damage to or destruction of the property of the victim or another person; or (c) Threaten[ed] a specific person or group of persons and places that person, or members of the specific group of persons, in reasonable fear of harm to person or property.

Wash. Rev. Code § 9A.36.080(1); *see also* § 9A.36.083. The Thuillards, however, have not alleged any facts suggesting that Customs' conduct was motivated by

Mrs. Thuillard's belonging to a "protected class." Because speculative inferences alone are insufficient to defeat a motion brought under Federal Rule of Civil Procedure 12(b)(6), *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007), the Thuillards' malicious harassment claim cannot survive.

Similarly, the Thuillards fail to state a valid claim of civil harassment. Washington's civil harassment statute, Wash. Rev. Code §§ 10.14 *et seq.*, "is intended to provide victims with a speedy and inexpensive method of obtaining civil antiharassment protection orders." Wash. Rev. Code § 10.14.010. The Thuillards have pointed to no Washington decisions, and we have found none, holding that damages for past injury are recoverable under this statute. Thus, the Thuillards, who are seeking only monetary damages, cannot obtain relief under Washington State's civil harassment statute.

B. Malicious Prosecution

The district court erred in dismissing the Thuillards' malicious prosecution claim on the ground that the grand jury's determination of probable cause is a barrier to the Thuillards' ability to state a claim of malicious prosecution. The district court necessarily assumed that an irrebuttable presumption of probable cause arises whenever a grand jury returns an indictment. Such an irrebuttable presumption, however, is irreconcilable with long-established Washington law,

which governs the Thuillards' claims. *See, e.g., Jones v. Jenkins*, 27 P. 1022, 1026 (Wash. 1891).

In the alternative, Customs also moved for summary judgment. Assuming without deciding that the grand jury's indictment of Mrs. Thuillard triggers a *rebuttable* presumption of probable cause, we conclude that the Thuillards have submitted sufficient evidence to create a genuine issue of material fact as to each element of malicious prosecution, including lack of probable cause. *See Clark v. Baines*, 84 P.3d 245, 248 (Wash. 2004) (listing the elements of malicious prosecution). The parties agree that, at this stage, there is a genuine dispute as to, among other things, the date on which Mr. Thuillard allegedly crossed into the United States without paying a $5.00 fee on his family car.[1] Contrary to Customs' submission, this dispute is material to lack of probable cause. Reviewing the evidence in the light most favorable to the Thuillards, we must assume that Mr. Thuillard may have crossed into the United States and evaded the (inapplicable) $5.00 fee at a time when Mrs. Thuillard was out of state. Then, on this record, the finder of fact may conclude that there was no probable cause to prosecute Mrs.

[1] The prosecution of Mrs. Thuillard was predicated on Mr. Thuillard's failure to pay a $5.00 fee on his family vehicle when he crossed into the United States—a fee that the district court, in dismissing the charge, held was never owed.

Thuillard as an accomplice in the commission of any crime[2]—not even the crime alleged by the prosecution—and that the indictment was the product of false grand jury testimony by Customs employees regarding the relevant dates. Accordingly, we cannot conclude on this pre-discovery record that the Thuillards have failed to raise a genuine dispute of any fact material to lack of probable cause.[3]

III. Conclusion

For these reasons, we reverse the district court's judgment in so far as it dismissed the malicious prosecution claim and the related intentional infliction of emotional distress claim to the extent that it arises out of the criminal prosecution of Mrs. Thuillard. We affirm the district court's dismissal of the other claims. We remand to the district court for further proceedings consistent with this memorandum, which shall include an opportunity for the parties to complete discovery.

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[2] We emphasize that Customs may not meet its burden by simply showing probable cause that Mrs. Thuillard aided or abetted the importation of goods on which no duty was legally due on December 10, 1998. At the very least, the government must show probable cause that Mrs. Thuillard aided or abetted Mr. Thuillard in evading the presumed $5.00 use fee on the family vehicle, which is the only factual predicate proffered by the government.

[3] Nothing in this disposition is meant to preclude the district court from another grant of summary judgment should the post-discovery record indicate that summary judgment is warranted, consistent with this disposition.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

The parties shall bear their own costs on appeal.